Supreme Court, U.S.
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No. 96-1517

In The

Supreme Court of the United States

October Term, 1996

DAVID FIDEL; MARIT FIDEL; ERIK FIDEL; and HILDA FIDEL,

Petitioners,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; LEXINGTON INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP; PARKER, COULTER, DALEY & WHITE; CLEMENS, GLASSMAN & CLEMENS; STULL, STULL & BRODY; GIBSON, DUNN & CRUTCHER; HERBERT J. YOUNG; JOHN R. WILLIAMSON; MELVIN SPITZ; BERNICE HUTTER; RAFAEL E. VEGA; HOUSTON I. FLOURNOY and ROBERT R. SPRAGUE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals correctly hold that Petitioners' diversity action based solely upon state law claims was barred by the applicable state statutes of limitations?[1]

2. Did the Ninth Circuit Court of Appeals correctly hold that Petitioners' state law claims which seek to collaterally attack a settlement notice approved by the District Court are protected by the "litigation privilege" established by state law, as set forth under California Civil Code section 47(b), given the absence of extrinsic fraud which is demonstrated in the record? **Respondent addresses only this issue in this Brief in Opposition.**

3. Did the Ninth Circuit Court of Appeals correctly hold that a party may not be granted leave to amend a

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[1] Question 1 has been fully discussed in the Opposition Brief filed by Respondents Herbert J. Young, et al., and by Respondent Gibson, Dunn & Crutcher LLP. Respondent joins in that Brief and does not further revisit such alleged issue here.

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

complaint where the record demonstrates that an amendment would have been futile?[2]

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[2] The Petition poses but does not substantively address this issue. The statute of limitations having run, it is obviously settled that it was and remains futile to amend. (Appendix A, 16a-17a) *Accord, Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993) (refusal to allow amendment upheld); *DeSoto v. Yellow Freight Systems, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) ("[a] district court does not err in denying leave to amend where the amendment would be futile"); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (upholding denial of leave to amend); *Reddy v. Litton Indus. Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991); *Johnson v. District Marine Eng. Beneficial Ass'n*, 857 F.2d 514, 518 (9th Cir. 1988) (upholding denial of leave to amend); *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 650-51 (9th Cir. 1984).

LIST OF PARTIES

It appearing that Bernard Fidel has accepted the decision of the Ninth Circuit Court of Appeals and has not joined in the present Petition challenging same, the remainder of the parties are correctly identified in the caption. This brief is filed on behalf of Respondent Clemens, Glassman and Clemens whose counsel of record is Long & Levit, LLP.

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INTRODUCTION AND SUMMARY OF ARGUMENT

There is nothing to review here. An intermediate federal court affirmed a decision by a district court judge that, *inter alia*, Petitioners' central claim (that a notice of settlement of a class action omitted the fact that there was more than one insurer whose policy could have been tapped to fund a settlement and that one policy had been cancelled) was spurious as well as time and substantively barred. The Petition is thus nothing more than another attempt to second guess the uniform judgment of a district court and the court of appeals that the facts were either disclosed or immaterial.

All of the questions purportedly presented to this Court arise from state law causes of action and depend upon the application of state law for their adjudication. The federal court's subject matter jurisdiction was invoked solely upon diversity grounds. (Complaint ¶ 16) *See generally* Supreme Court Rule 10; *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("Standing alone, a challenge to state-law determination by the Court of Appeals will rarely constitute an appropriate subject of this Court's review.") *Accord, Burks v. Lasker*, 441 U.S. 471, 486 (1979) ("We did not grant certiorari to decide a question of state law"); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of the Court of Appeals on a matter of state law, and we find no reason for departing from that tradition in this case").

This Court is further reluctant to review a state law issue where, as here, both the district court and the court of appeal have applied the same law. *See Bishop v. Wood*, 426 U.S. 341, 346 (1976) ("[T]his Court has accepted the

interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion").

Accordingly, there is no reason for this Court to grant review of the unpublished memorandum decision of the Ninth Circuit Court of Appeals.

STATUTE INVOLVED[3]

California Civil Code section 47:

> "A privileged publication or broadcast is one made:
>
> . . .
>
> (b) In any judicial proceeding . . . "[4]

[3] Respondent sets forth here only the provision raised by the question addressed in this Brief in Opposition.

[4] In 1994 the statute was amended, without express retroactive effect, to exclude concealment of the existence of an insurance policy or policies. *See* 1994 Cal. Legis. Serv. ch. 700, § 2 (West) (S.B. 1457). That amendment has no application here as: 1. No part of the Civil Code is retroactive unless expressly declared (Cal. Civ. Code § 3 (West 1996); and 2. It is undisputed in the record below that no material fact regarding insurance coverage was concealed from the district court.

COUNTERSTATEMENT OF THE CASE

This is a case of post-settlement remorse brought in their own names and for their own private benefit by Petitioners who were Class Members in *In Re Gibraltar Financial Corporation Securities Litigation* ("GFC"). Petitioners willingly and without coercion separately applied to participate in the court-approved and supervised settlement of GFC and together, as their *pro rata* shares, received in excess of approximately $200,000 from the settlement fund. More than four years after the Judgment became final and their Claim Forms were signed and submitted (and without offering to return to the Class any portion of the money received from the settlement), Petitioners brought the present action alleging that virtually everyone who had anything to do with the settlement of GFC had wronged.

REASONS FOR DENYING THE WRIT

Petitioners' claims that this is a case of constitutional significance are plainly wrong. Petitioners raise no federal issues. To the extent Petitioners present any legal issues, they arise solely under the law of California. Further, they are fact bound. Petitioners are simply trying to substitute their judgment for the district court's insofar as Petitioners admit that the district court had all facts before it. (*See, e.g.*, Petition at 19, 22 n.21) This Court sits neither to find facts nor to decide state law issues.

I. THE ONLY ISSUE PRESENTED IS A FACT-BASED QUESTION OF STATE LAW

As regards Petitioners' Question 2, the interpretation of California Civil Code § 47(b) is patently a question of state law. Contrary to Petitioners' attempts to frame the issue otherwise, the case does not involve an interpretation of Federal Rules of Civil Procedure 23 or the Due Process Clause. The Ninth Circuit Court of Appeals simply – and properly – applied the privilege set forth under California Civil Code § 47(b) in affirming the district court's dismissal of the action on other grounds. Appendix A, 14a. It is legally indisputable that state law privileges raised in the context of a defense to state law claims are recognized in federal court. Federal Rule of Evidence 501.

Petitioners are thus wrong in their tortured assertion that the purposes and objectives of FRCP Rule 23 were frustrated by California's litigation privilege. To the contrary, in this FRCP Rule 23 class action, additional procedural safeguards, such as court approval of the class settlement, were in place to protect the class members in the course of settlement. The court of appeal recognized that the notices of which Petitioners complain were approved by the district court. (Appendix A at 15a)

II. THE ISSUE THAT WOULD BE BEFORE THE COURT IF THE PETITION WERE GRANTED ON THIS ISSUE WOULD BE THE FACTUAL DETERMINATION OF THE NATURE AND AMOUNT OF INSURANCE AVAILABLE TO SETTLE A CLAIM

The issue that would be before the Court if certiorari were granted would not involve Rule 23 but rather the factual determination of the nature and amount of insurance available to settle Petitioners' original claim. That is not a question properly resolved by this Court. *See* Supreme Court Rule 15.1; *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

The confusion stems from Petitioners' misstatement of the nature and amount of insurance which was "available" to settle GFC. In fact, Petitioners each signed a Proof Of Claim And Release (the "Claim Form") which specifically mentioned the insurers by their full formal names and identified them as being among the persons to be released. The subject of the two insurance policies is discussed at some length by the Ninth Circuit Court of Appeals. (*See, e.g.*, Appendix A, 4a and n.4)

Petitioners' misstatements of the factual question which the Court would confront (and the Ninth Circuit Court of Appeals has already addressed) if the Petition were granted cloud the record and serve only to unnecessarily castigate the efforts of the district court, without whose assistance the settlement of GFC might never have been achieved.

CONCLUSION

The fact bound decision of the Ninth Circuit Court of Appeals affirming dismissal of Petitioners' state law claims is not appropriate for review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Dated: April 23, 1997

Respectfully submitted,

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